MAGISTRI VACARII

SUMMA DE MATRIMONIO

EDITED BY

FREDERIC WILLIAM MAITLAND, LL.D.

DOWNING PROFESSOR OF THE LAWS OF ENGLAND IN THE UNIVERSITY OF CAMBRIDGE

[*Reprinted from the* LAW QUARTERLY REVIEW, 1897]

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CANON

TO

PROFESSOR FELIX LIEBERMANN

LL.D. CAMB.

THIS TRANSCRIPT IS DEDICATED

MAGISTRI VACARII SUMMA DE MATRIMONIO.

INTRODUCTION.

OF late years a good deal has been written about Vacarius. Very recently Dr. Liebermann [1], to whom the students of English legal history already owed a heavy debt of gratitude, has summed up what is known of the life of this Italian legist and has added to the sum by calling attention to two works of his which are lying in manuscript at Cambridge. The one of these is theological, the other is devoted to the law of marriage. The latter is here printed with a few notes. Unfortunately I have not that knowledge of the canon law which would enable me to edit this treatise scientifically; but I believe that I can give a fairly correct copy of it, and that it will be of some interest to a few Englishmen and to a few foreigners.

Of Vacarius himself I will say but very little, since I have nothing to add to what has been written by Dr. Liebermann and others in accessible places [2]. Only let us remember, first, that in all probability he came to England as early as 1148, and was living here as late as 1198; secondly, that in the meanwhile he had dwelt under the patronage of Archbishop Theobald of Canterbury and afterwards of Archbishop Roger of York; thirdly, that we have some reason for supposing that his great book, the Summa of Justinian's Code, was finished in 1149; and fourthly, that we have fairly good evidence of his having taught Roman law in Oxford at some time in his long career.

The manuscript in question is preserved in the University Library at Cambridge (I i. 3. 9), and its contents are described at some length in the printed catalogue (vol. iii. pp. 412–415). For the more part they consist of various works of St. Augustin. Better judges of handwriting than I am have said that this volume was compiled near, but rather before than after, the year 1200. At the beginning there is a table of contents which seems to be coeval with the body of the book. The portion of this which is most interesting to us runs as follows:—*Augustinus de agone christiano.*

[1] English Historical Review, xi. 305.

[2] Rashdall, Universities of Europe, ii. 335; Pollock and Maitland, Hist. Engl. Law, i. 97; Holland, Oxford in the Twelfth Century (Oxford Hist. Soc.).

Item eiusdem sermo Mulierem fortem[1]. *Item de trinitate. Summa Magistri Vacarii de* [apparently *matrimonio* has been erased and then a later hand has added *assumpto homine. Item eodem* [*sic*] *de matrimonio*]. *Expositio S. Augustini contra paganos.* The pages are divided into two columns. A little way down in the second column on a certain page we find the rubric *Magistri Vagarii tractatus de assumpto homine incipit.* The treatise that is thus introduced fills rather more than twenty columns. Then without interval comes the rubric *Hic incipit quedam summa de matrimonio Magistri Vacarii*, and on this at once follows our treatise, in the first words of which the writer speaks of himself as the author of an *opusculum de assumpto homine.* Our treatise fills rather less than twenty-six columns, and in the column in which it ceases another brief tract begins with the words *Omnium expetendorum prima est sapientia.* The writing is good, and I do not think that the scribe can be charged with many mistakes.

The disquisition *de assumpto homine* is heralded by a prefatory letter; this will be printed below by way of appendix. The author is concerned with 'the assumption of man' by Christ. He is making an attack upon what he regards as a fashionable but erroneous philosophy. As I understand him, he seeks to prove that Christ assumed not only the reasonable soul and human flesh, but also the 'substance' of man. The course of his argument I dare not attempt to describe. He is angry with certain adversaries who (so he says) fill the high places in the schools; but he does not name them. The only writers whom he expressly mentions are ancients, such as Augustin, Jerome, Claudian and Boethius. I should suppose that he is attacking that doctrine of the Incarnation which is known as Nihilianism, and that his vigorous words are aimed either at the great Peter Lombard himself or at some disciples of his who outran their master along a dangerous road[2]. They found another enemy in a countryman of ours, one John of Cornwall[3], and their doctrine was condemned by Alexander III. In this case Vacarius seems to have been fighting on what by its success was to prove itself to be the orthodox side. It was otherwise when he wrote on marriage. Here he championed a losing cause, for this same Alexander dealt its death-blow[4].

[1] This, it is said, really comes not from Augustin, but from Bede.

[2] Sentent. lib. iii. dist. 290. See Dorner, The Person of Christ, Engl. trans., Div. 2, Vol. ii, pp. 310 ff.; Baur, Lehre von der Dreieinigkeit, ii. 548 ff.; Rashdall, Universities, i. 54. The watchword of the school was: *quod Christus, secundum quod est homo, non est aliquid.*

[3] Martène et Durand, Thesaurus Novus, v. 1657; Dict. Nat. Biog. s.v. John of Cornwall.

[4] In the preface to the *De assumpto homine* the hand of the civilian seems to be betrayed when its author says, 'Cum lege cautum sit nullam esse interpretationem que tantum valeat ut preiudicare possit manifesto sensui.' I have not, however, been able to trace the origin of this maxim.

The tract on marriage may speak for itself. I must not presume to comment upon it at any length, nor endeavour precisely to fix its place in the important controversy to which it belongs. In the main it will be intelligible to any one who will read a few modern books and keep a copy of the Decretum Gratiani open before him [1]. But two or three explanatory remarks I will venture to make.

In the middle of the twelfth century the Church throughout the Western world was successfully claiming for her courts an exclusive right to pronounce on the validity of marriages. But in truth she was not as yet equipped with any doctrine of wedlock sufficiently definite to serve as a legal theory. A few brief texts in the Bible; a few passages in the works of the Fathers, some of which were but too mystical, while others were but too hortative; a few canons and decretals that were not very consistent with each other—these were the unsatisfactory materials out of which law was to be made. And the law was to be cosmopolitan. The very nature of the claim to treat marriage as a spiritual matter, a divinely ordained institution, prevented the Church's lawgivers and lawyers from laying a decisive stress upon any rites or usages that were merely national. A cosmopolitan law of marriage cannot make any ceremony or formality essential. It must compose its marriage out of those elements which we can conceive as common to the marriages of all people in all ages, such as the agreement to marry, the beginning of cohabitation, and the sexual union. Difficulties which in any case would have been great were complicated by the supposed necessity of proving that marriage is in some sort—but who shall say what sort?—a *sacramentum*, and of giving the name of marriage to such union as the Christian legend would allow St. Joseph to contract with the Blessed Virgin.

Gratian (circ. 1139–42) made a determined endeavour to obtain a consistent theory out of the materials that he collected [2]. He holds that the *sponsalia*, the agreement to marry hereafter, constitute an 'initiate marriage,' which however only becomes a 'consummate marriage' at the moment of physical intercourse. Were we to translate his doctrine into modern terms, we should say that really there is no marriage until such intercourse has taken place, though from this principle he would not draw all the inferences that would be drawn from it by modern law. About the same time Peter Lombard [3] was developing a new distinction, the famous

[1] See von Scheurl, Entwicklung des kirchlichen Eheschliessungsrechts, Erlangen, 1877; Freisen, Geschichte des canonischen Eherechts, Tübingen, 1888; Esmein, Le mariage en droit canonique, Paris, 1891; Friedberg, Lehrbuch des Kirchenrechts (ed. 4, Leipzig, 1895), pp. 408-413.

[2] See especially C. 27. q. 2.

[3] Lib. iv. dist. 27.

distinction between *sponsalia de futuro* and *sponsalia de praesenti.* Espousals by words of present time, which are contracted if man and woman express their agreement to be from henceforth husband and wife, constitute a perfect marriage, though the *copula carnalis* is necessary to introduce into the union the sacrament of Christ and His Church. On the other hand, espousals by words of future time are no marriage; they are but an agreement that there shall be a marriage hereafter.

Thenceforth there were two main theories before the world. Gratian's was spoken of as the Italian or Bolognese theory; Peter's became the theory of the Gallican Church. Warm debates ensued. In particular, about the year 1156, the Italian canonist Rufinus came forward as a vehement champion of Gratian's cause[1]. But time was on Peter's side. His doctrine had the advantage of being compatible with the existence of a perfect marriage between St. Mary and her reputed husband. Pope Alexander III, while he was but Magister Rolandus, had written on this subject, and, though he accepted Gratian's principles, expressed some doubt about the deductions that were drawn from them[2]. As pope he went over to Peter's side, and in the course of his long pontificate settled the law of the Church by a series of decisions that were promulgated in decretal letters. Peter's doctrine that consent *per verba de praesenti* constitutes a marriage became the law of the Church; but at the same time some traces of the opposite theory were retained, for by 'consummation' a marriage gained an additional degree of indissolubility and perhaps of sacramentality.

Now Vacarius has a theory which differs from all of these. The true act of marriage, the act which marks the moment at which the marriage takes place, is the mutual delivery (*traditio*) of man and woman each to each. Of course as a condition there must exist a pact of the appropriate kind. The man delivers himself as husband, the woman delivers herself as wife. But it is not a mere expressed consent that makes the marriage; there must be a delivery, a 'tradition.' Again, as a condition there must be the natural power of effecting a carnal union; but the *carnalis copula* is unessential; it does not make the marriage; the marriage is made by the 'tradition.' In a startling passage and by way of *reductio ad absurdum* Vacarius brings the Bishop of Hippo to the side of the nuptial couch to upbraid the bridegroom for embracing a woman to whom he is not yet 'perfectly' married. 'Inciuiliter loqueris Augustine,' is the man's reply, 'for she is my wife, having become so by tradition, and the first embrace is as legitimate as the last.'

[1] Summa Rufini (ed. Schulte, Giessen, 1892), p. 389.
[2] Summa Rolandi (ed. Thaner, Innsbruck, 1874), pp. 126-133.

That harmful text about man and woman becoming 'one flesh' is cleverly encountered by another text. From the moment of the marriage, that is, from the moment of the tradition, the man has no power over his own body, or, in other words, his body is already his wife's and her body is his. Therefore this is the moment at which they become 'one flesh.' At this moment the law makes them 'one flesh' by giving to each power over the other's body; the sexual union is mere matter of fact. We must distinguish between the perfection of a legal act and the fulfilment of obligations which that act creates. We must not blur this distinction by talk about 'consummation.' A marriage is a marriage, and it cannot become more of a marriage than it already is.

Vacarius is prepared to carry this thought into the mystical sphere of sacramentality. The marriage effected by 'tradition' already contains the sacrament of Christ and the Church. At the moment of delivery the man and woman are made 'one flesh' by a *vinculum iuris*. Further, he protests against a popular use of the word *ratum*, which would make it imply indissolubility[1]. This use is, for one thing, unclassical; no single sentence in the *Corpus Iuris Civilis* sanctions it. A marriage effected by tradition is a *matrimonium ratum*, and this it would be even if the law permitted a divorce *a vinculo*. We are bidden remember that even after the time of Christ, even after the time of Justinian, divorce was possible; St. Joseph and St. Mary married under a law that allowed divorce. Logical to the last, Vacarius will even declare that the marriages of infidels are *rata*, and contain the sacrament of Christ and the Church.

This attempt to make all turn upon the mutual *traditio* does not indeed stand quite alone. A similar attempt seems to be made for a moment by the author of the book that is known as the *Summa Coloniensis*[2]. He is thought to have been a German, to have done his work about the year 1170 in the province of Köln, and to have been an adherent of the anti-pope Calixtus. At this point we shall do well to remember that our Henry II carried on a flirtation with the Calixtines, that Reinald von Dassel, Archbishop of Köln,

[1] dictum post c. 17, C. 28. q. 1: 'Coniugium enim aliud est legitimum et non ratum, aliud ratum et non legitimum,' aliud legitimum et ratum. Legitimum coniugium est quod legali institutione uel prouinciae moribus contrahitur. Hoc inter infideles ratum non est, quia non est firmum et inuiolabile coniugium eorum.'

[2] The work was described by Schulte, Sitzungsberichte der Wiener Akademie, vol. 64, p. 93. The relevant passage is given by Scheurl, *op. cit.* p. 168, and Freisen, *op. cit.* p. 189: 'Item cum in hoc pacto uterque dicat alteri *Trado me tibi*, si verba cum effectu accipiuntur, ex tunc caro utriusque alterius efficitur. Illud enim generale est in huiusmodi contractibus, ut traditione rei dominium transferatur. Proinde, ex quo sponsa viro tradita et cum eo velata atque traducta est, ex tunc caro eius viri est, etsi nuptiale mysterium nondum in ea completum sit, et hoc Gratianus post multas ambages sentire videtur.'

who was the soul of the schism, visited our shores, and that Roger of Pont l'Evêque, Archbishop of York, was both the patron of Vacarius and the rival and enemy of Becket[1]. Some intercourse between Vacarius and the German canonist is not out of the question.

We may well think that the doctrine of Vacarius had much to commend it. On the one hand, it cannot have stood very remote from Germanic custom, while on the other, it was not out of harmony with the usage described in the Digest, for though some would teach us nowadays that the Roman marriage became in theory a merely consensual and formless transaction, still undoubtedly great stress was laid on the *deductio in domum* as being the usual and almost necessary evidence of a marriage. Also it was much in the vein of our own ancient lawyers that some change of 'seisin,' some *traditio vel quasi* (as Vacarius calls it), should be regarded as the act of marriage. However, unfortunately for the Church and unfortunately for the world, the Church's law of marriage took a different turn. The voice of Vacarius is *Vox clamantis in deserto.* To this may be due the fact, if fact it be, that his voice is transmitted to us by an unique manuscript.

At another point he opposes the triumphant doctrine of the canonists. A young girl who is in the power of parents or guardians cannot be married without their consent. If that be not given, there will be no marriage, but at best a *contubernium.* He accuses his adversaries—and here he has both Gratian and Peter Lombard against him—of frittering away the clear words of Pope Evaristus[2] (100?–109?). Those words we now know to be the words of the Pseudo-Isidore[3]. Neither Vacarius nor his foes knew that, and in his eyes they are guilty of eluding a plain decree of a pope who was learned *in utroque iure.* Here again he had morality, decency, ancient law, and the remote future for allies; but the current of sacramentalism was too strong to be stemmed.

That he had Gratian's work before him seems quite plain, though he never names Gratian nor the Decretum. Also we may infer that the Decretum was still new and had not yet established itself as the one classical text-book of the canon law, for though he quotes many of the 'authorities' that are contained in it, and also quotes some of the *dicta Gratiani*, he never mentions any 'distinction,' 'cause,' or 'question,' as assuredly he would have done had he been writing near the end of the twelfth century.

[1] See, for example, the letter addressed by Henry to the Archbishop of Köln, telling how the Archbishop of York and others have gone as the king's envoys to threaten Pope Alexander; Materials for the Life of Becket, v. 428.

[2] c. 1, C. 30. q. 5.

[3] Hinschius, Decretales Pseudo-Isidorianae, p. 87.

Whether he had before him the 'Paleae,' that is, the passages inserted in the Decretum by Gratian's pupil Paucapalea[1], seems more doubtful. He quotes two passages that are thus introduced; but from this it does not follow that they stood in his copy of the Decretum. To one of these two he repeatedly[2] alludes, but, whereas in the manuscripts which are the base of the modern editions of Gratian's book this text is ascribed to Augustin[3], Vacarius attributes it to Pope Hormisda (A.D. 514–523). It is a passage which appears also, and under Augustin's name, in the Compilatio Prima[4] and in the Decretals of Gregory IX[5].

With the theory of marriage stated by Peter Lombard our author was familiar; but I cannot say that he takes any words from the Parisian schoolman, nor do I see any proof that he had read the Summa of Paucapalea, the Summa of Roland, or the Summa of Stephen of Tournay. On the other hand, it is pretty plain that he borrowed phrases from and directed much of his argument against Rufinus. This, if Dr. von Schulte is right, would allow us to assign his treatise to any year after 1156[6].

If we place out of account the two 'Paleae' which have been already mentioned, I believe that he cites but two other 'authorities' which he could not have obtained from the Decretum. (1) The first of these[7] is a forged letter of Alexander, pope and martyr, that is, of Alexander I (109?–119?). This appears in the Summa of Rufinus[8], also in the Summa of Johannes Faventinus[9], also in the Collectio Lipsiensis[10]. It is a forged decretal, but it is not one of the Pseudo-Isidorian brood. No more seems to be certainly known of it than that it became current in the twelfth century. Not impossibly it was concocted in the course of the controversy about marriage in order to support the Bolognese against the Parisian theory. (2) The second of these two authorities[11] is a canon of the Council of Verberie, held in the year 753. This in its original form[12], and in the form in which Vacarius knew it, distinctly contemplates the possibility of a true divorce in our sense of the term: that is to say, in a certain case a man whose wife will not follow him into a foreign country is allowed to marry another. Part of this canon appears in the Decretum, but the part

[1] Schulte, Geschichte, i. 62. 109.
[2] Vacarius, §§ 12, 19, 25, 26.
[3] c. 51, C. 27. q. 2.
[4] c. 1, Comp. Prima, 4. 4.
[5] c. 1, X. 4. 4. The other passage is quoted by Vacarius, § 22, and is the Palea which stands as c. 18, C. 27. q. 2.
[6] Summa Rufini, ed. Schulte, p. xi.
[7] Vacarius, § 20.
[8] Summa Rufini, pp. xxxi, 396.
[9] Schulte, Sitzungsberichte der Wiener Akademie, vol. 57, pp. 589, 590.
[10] Friedberg, Quinque Compilationes, p. 205; Freisen, Eherecht, p. 183.
[11] Vacarius, § 39.
[12] Mon. Germ., Capitularia, ed. Boretius, i. 41; Freisen, *op. cit* p. 783.

which permits a divorce has been carefully excised [1]. Vacarius quotes, or rather paraphrases the original form of the text, but only in order that he may show that strange things have occasionally been permitted. Possibly he found the whole canon in the pages of one of Gratian's predecessors, Regino of Prüm [2], for example, or Burchard of Worms [3].

In favour of an early date for the book we have not only the informal manner in which the authorities that lie in the Decretum are cited, and the assumption that the grand marriage question is still open, but also the fact that no notice is taken of the epoch-making decretals of Alexander III [4]. This is the more significant because one of the most decisive of those decretals was sent to England [5]. The popes, it is true, had hardly as yet made good their right to legislate on a large scale, and the canonists were still ready to say upon occasion that a pope had gone wrong. We may fairly suppose, however, that had Vacarius known these Alexandrine decretals, he would have felt bound either to hold his peace or to controvert them. Magister Rolandus, when he had taken possession of the chair of St. Peter, was not a man who could be quietly ignored. Unfortunately his pontificate (1159–1181) was long, and few of his decretals have been dated. Nevertheless if 1156 or thereabouts is the earliest date to which we can attribute this Summa, the latest date is, I should suppose, not much later.

That its author was the Vacarius of whom all of us have heard, and not another person of the same name, seems clear. We know Vacarius as a legist, and this is just such a tract as would be written by a legist who for the nonce was making an incursion into the canonist's territory. Having before his eyes the precision of his own beautiful Digest, he seems to feel a sort of pity and even contempt for the boneless scraps of exhortation and mysticism that are collected in the Decretum. He complains that the law of the Church is always shifting and wabbling [6]. He complains of the canonist's method. What is the use of an attempt to make a concordance of discordant canons when the canons are discordant [7]? His theory of marriage, too, is a legist's theory.

[1] c. 4, C. 34. q. 1. [2] Regino, ii. 123 (ed. Wasserschleben, p. 262).
[3] Burchard, ix. 54 (Migne, vol. 140, col. 824); Freisen, *op. cit.* 801.
[4] Freisen, p. 191; Esmein, i. 127.
[5] c. 6. Comp. 1, 4. 4 (Friedberg, p. 47); translated, Pollock and Maitland, Hist. Engl. Law, ii. 369. See also Mansi, Concilia, xxii. 293.
[6] Vacarius, § 16: 'Ecclesiastica namque iura dissonas recipiunt sentencias et varias formas, plerumque inutiles, quia non obseruantur.'
[7] Ibid., § 16: 'Illi enim qui ad hoc frustra laborant ut quamlibet passim contrarietatis *discordiam* reuocent ad *concordiam*, plerumque, ut vicium huiusmodi contra veritatem evitare contendunt, in veritate labuntur in peius.' If we remember that Gratian called his book *Concordia discordantium canonum*, this remark will seem pointed enough.

It may not be just that which modern scholars will discover in Justinian's books, but it brings marriage into line with the conveyance of property. Other legal transactions, such as donation and partnership, are constantly before his mind, and in his eyes a word from Pomponius is enough to sweep away a lot of foolish talk about *matrimonia* which are and *matrimonia* which are not *rata*[1]. We should hardly be going too far were we to say that this is a civilian's protest against the mess that is being made of the law of marriage by canonists and divines. We might like, perhaps, to go further and to contrast an Oxonian with the Bolognese and with the Parisian theory of marriage, and thus to unite in one story the three great universities of the twelfth century. But we have no warrant for this. Vacarius's pamphlet (for it is no more) is no school-book comparable with the Decretum and the Sentences, and, for anything that we know, may represent the opinion of one solitary and protesting legist. That its author was both daring and acute is plain.

Another guess is inviting. If we attribute this tract to the years which closely follow 1156, we give it to a time when England and Rome, Normandy and Gascony were witnesses to the dogged litigiousness of that immortal plaintiff, Richard of Anesty[2]. Beginning his long suit in 1158, he triumphed in 1163. He had the professional aid of another Italian lawyer, whose name has elsewhere[3] been coupled with that of Vacarius, namely, of Master Ambrose[4]. Is it impossible that if Magister Ambrosius was of counsel for the plaintiff, Magister Vacarius was retained for the defence? Or again, if in 1159 Vacarius still remained an inmate of Archbishop Theobald's household, we can hardly doubt that he was consulted about a case which raised nice questions of matrimonial law and tasked the wisdom of the archiepiscopal court to its uttermost. One of these questions was whether a divorce pronounced in Stephen's reign by the legate Henry of Blois was valid. In Henry I's day one William had, so some asserted, married Albreda, while others maintained that this was no marriage and that at a later date he had married Adelicia. In Anesty's suit Archbishop Theobald's secretary, John of Salisbury (to whom Vacarius was 'Vacarius noster' and from whom we learn of Stephen's attempt to silence the voice of Roman law), reported to Alexander III the story of these would-be marriages and the subsequent divorce. He said that the former marriage was upheld and the nullity of the second declared by Henry of Blois, who was

[1] Vacarius, § 36.

[2] Joan. Saresberiensis Epistolae, ed. Giles, vol. i. pp. 123–132; Palgrave, English Commonwealth, vol. ii. pp. v–xxvii, lxxv–lxxxvii.

[3] Liebermann, Engl. Hist. Rev. xi. 313, 314.

[4] Palgrave, *op. cit.* p. vii.

acting in pursuance of a mandate from Innocent II (1130–1143). This mandate apparently supposed that some sort of formal 'tradition' of Albreda by her father had taken place, but that William had never removed her from her father's house, and it was admitted that there had been no ecclesiastical ceremony and no sexual intercourse. Nevertheless, Innocent decreed that if there had been a consent to be thenceforth husband and wife, there had been a marriage, and that the subsequent union with Adelicia, though solemnly celebrated in church and blessed with offspring, was adulterous. In short, Innocent seems to have acted upon the theory of marriage which is now generally coupled with the name of Peter Lombard [1]. Now this was just such a case as would have set Vacarius a-writing his pamphlet. There might be a pact by 'words of present time,' but was there a marriage if Albreda was left under her father's roof [2]? Often what looks like a speculation of abstract jurisprudence has been the outcome of a concrete lawsuit, and is none the worse for having its origin in real facts. This is only a guess; but the temptation to connect together two men so famous in our legal history as the first teacher of Roman law and the heroic English litigant was not to be withstood.

MAGISTRI VAGARII TRACTATUS DE ASSUMPTO HOMINE INCIPIT.

Suo B. suus V. salutem. Post collationem de homine assumpto inter nos habitam, sepe cum plerisque aliis uestigia opinionis uestre sectantibus de re eadem tractatum habui. qui etiam rationem ipsius opinionis mihi exposuerunt precipuam. Summa uero eiusdem opinionis ea est ut non sit aliquis homo qui pro nobis interpelletur, quem susceperit deus uerbum, set animam et corpus tantum assumpsit. Eius autem urgentissimam rationem talem reddunt: quam [3] personam a uerbo assumptam esse, necesse est ut dicamus, si concesserimus eum assumptum esse qui ex anima et carne subsistat ut pro nobis interpellare possit. Nam cum dicimus dei sapientiam seu uerbum suscepisse humanam naturam uel hominem, nichil nisi ratio-

[1] Innocent's mandate is set out in John of Salisbury's letter (i. 125). It appears also as c. 10, Comp. Prima, 4. 1 (Friedberg, Quinque Compilationes, p. 44). It must belong to the last years of Innocent's pontificate (1130–1143). Henry of Blois was appointed legate on March 1, 1139 (Dict. Nat. Biog., s.v. Henry of Blois). Palgrave (*op. cit.* p. viii) thought that the divorce was pronounced in 1141 or 1143. The exact date of Peter Lombard's work has been a matter of controversy.

[2] According to Innocent there had been a *traditio* by Albreda's father, but the *traductio in domum mariti* was to take place upon a future day, and meanwhile she was *commendata* to her father.

[3] Possibly *quem*.

nalem animam et humanam carnem absque earum in unam substantiam conpage significamus assumptas. Hec est doctrina celebris a quibusdam modernis inuenta magistris. Hec est uia in scolis maxime frequentata et trita hodie. porro huiusmodi disciplina cum nullis auctoritatibus roborari possit, licet aliquibus paucis uix aliquo modo colorari querat, regulas tamen suas habet et traditiones, quibus maiorum auctoritates eludere possit, ut suum defendat errorem. Nam si qua obiciatur auctoritas, promptam habent responsionem secundum suas regulas, ut si auctoritas est expositione indigeat et interpretatione, cum econtrario lege cautum sit nullam esse interpretationem que tantum ualeat ut preiudicare possit manifesto sensui. Item ut tantum effugere possint ex leui occasione, nugari dicunt quemlibet urgentem eos. Naturamque humanam in Christo ita disponunt, ut dum totam eam Christo tribuere uideantur, animam rationalem et humanam ei carnem concedendo, totam ei auferant negando substantiam ipsius[1] hominis ex eis consistere. Vnde querenti mihi, Cum substantia fuerit infans ille quem magi adorauerunt, que substantia fuerit?' responderunt quidam quod diuina fuerit substantia et non humana. Hec et alia his similia induxerunt me et inpulerunt ad scribendum, et quamuis ipsa rei sublimitas et operis difficultas animum et uires mihi adimerent scribendi, eius tamen inuocato nomine qui desperata etiam consueuit petentibus donare, et ea paruulis pulsantibus aperire que sapientibus et prudentibus celantur, eius inquam inuocato nomine, et oculis ad celum erectis, opus meas extendens uires eius donatione inpleui, quod discretioni uestre dilectionis eo studio inspiciendum, discutiendumque commisi quo scriptum est, ut ueritatis amore singula diligenter examinetis, et si quid inprudenter ibi insertum fuerit, industria uestre prudentie, antequam ad alium perueniat, corrigatur. Euidentibus autem tam rationibus quam auctoritatibus pro ingenii mei exiguitate studui demonstrare que pocius sententia ueritate nitatur de homine assumpto, utrum ut anime et corporis assumptio non composuerit unam hominis substantiam in Christo, an talis omnino utriusque fuerit coniunctio ut ex eis unus subsistens fuerit homo substantie humane perfecte sicut quilibet alius[2] homo. [Rubrica] *De assumpto homine. quod substantia sit ex anima et carne subsistens tam animalis quam hominis, nature*[3] *proprietatibus subiecta non autem diuina. et quod homo cum sit persona, ipse tamen assumptus dicitur et non ipsa persona. et quod Christus et dominus glorie et gigas gemine substantie duarum sint substantiarum nomina. et non deus. et ideo ex dupplici substantia Christus esse una persona dicitur. et non deus, non homo ita dicitur. et quod deus uere et proprie inde est aliquid, quia est homo.* [4]Crebris itaque mutationibus et motibus . . . .[5] sed est secundum catholicos unius substantie humane specifica differentia seu specificata proprietas seu forma quedam, que proprio nomine humanitas uocatur, ut supra ostensum est. [Rubrica] *Hic incipit quedam summa de matrimonio Magistri Vacarii.*

[1] *ipsius* repeated. [2] *aliis*, MS.
[3] *n* with *e* above, preceded and followed by a stop, MS.
[4] Beginning of treatise. [5] End of treatise.

HIC INCIPIT QUEDAM SUMMA DE MATRIMONIO MAGISTRI VACARII[1].

[§ 1.] Duo sola sunt que audacem me semper faciunt ad scribendum, uidelicet communis utilitas et ueritatis amor. et quia scriptum est *Querite et inuenietis, pulsate et aperietur uobis*, hinc etenim illud peculiariter solet accidere mirandum, ut quod sciencia non habet id plerumque sollicitudo et studium querentis inueniat, sicut et mihi accidit in eo opusculo quod *de homine assumpto* scripsi. rem quippe arduam et mee paruitatis scienciam et uires ingenii mei excedentem, dono magis diuini muneris prosecutus sum. [§ 2.] Nunc quoque rem non minimam aggredior sed a pluribus quidem magistris attemptatam. a nullo uero reperi in aliquo expeditam, scilicet de coniunctione et dissolutione coniugii, que aliter a iure ciuili et longe aliter ab ecclesiastico iure disponuntur, quamuis eadem secundum utrumque ius sit matrimonii diffinitio. Est ergo res ista plurima diuersitate et difficultate confusa, et nube plena circa utrumque articulum, scilicet, copulationis et disiunctionis coniugii. que per magistrorum expositionem mihi magis turbata uidetur, tam rerum quam nominum ueritatem ipsam corrumpentium, tali proposita diuinatione[2], quod matrimonium aliud est iniciatum tantum, aliud iniciatum et consummatum et non ratum, aliud iniciatum et consummatum et ratum siue perfectum[3]. et, ut cetera interim omittam, iniciatum uolunt esse matrimonium in sponsalibus[4]. [§ 3.] Mihi autem uidetur id solum debere dici initiatum quod ita suis proprietatibus formatum est atque subnixum ut iam sufficiat ad id exequendum cuius respectu dicitur iniciatum. ita enim dicimus sacerdotem, uel misticum poculum, uel christianum iniciatum qui etiam fictus ad baptismum accessit. initium enim habet perfectum ex quo sequi potest effectus salutis. et ita in ceteris, et in matrimonio. res igitur ficti christiani[5] quantum ad initium perfecta est, si tantum perfecte sit iniciatus. respectu uero executionis est tantum inchoata. unde Augustinus de operibus vi. dierum ita scribit[6]: *Consummasse quippe ista intelligimus deum, cum creauit omnia simul ita perfecte ut nil ei in ordine temporum adhuc creandum esset, quod non hic ab eo creatum*

[1] The punctuation and division into sections proceed from the editor.
[2] *ditione* in text, but *diuinatione* in margin.
[3] dictum post c. 39, C. 27. q. 2; dictum post c. 17, C. 28. q. 1.
[4] dictum post c. 34, C. 27. q. 2.
[5] See c. 32 § 2, Dist. 4 de cons.
[6] Words to this effect are used by Augustin, de Genesi, lib. 9, cap. 1 (Migne, Patrol. vol. 34, col. 393).

esset: inchoasse autem ut quod hic prefixerat causis post impleret effectis. Ita est et in omnibus aliis, ut iniciationis perfectio insit perfectioni executionis, eam scilicet generando. nam sicut ex perfecto sacerdocio est perfectum eius officium, sic ex perfecto coniugii iure perficitur eius officium et executio. Secundum hoc non recte dicitur matrimonium iniciatum nisi sit iure perfectum. Quando autem id fieri contingat inferius docebitur. Hec autem et alia plura me pulsando et inuitando ad scribendum induxerunt, ea tamen moderatione habita ut ex pluribus quas exequi proposui sentenciis nullam faciam meam dampnando alias, sed singulas prout occurrerint rationes et auctoritates probando uel improbando.

[§ 4.] *De matrimonio.* Cum ad humani generis propagationem institutum sit matrimonium, cumque uir et[1] mulier in carnis commixtione una caro fieri credantur, ideo putauerunt quidam etiam summorum pontificum in ipsa carnis commixtione constare matrimonium. quam remouere opinionem curauerunt periciores. Vnde Ambrosius: *Cum iniciatur coniugium, coniugii nomen asciscitur*[2]. quasi tunc et non postea. unde subicit: *Non defloratio uirginitatis facit matrimonium sed pactio coniugalis*, id est, qua uiro re ipsa coniungitur, non qua uiro promittitur. Hec interpretacio congruit diffinitioni coniugii[3]: *est enim coniugium coniunctio maris et femine indiuiduam consuetudinem uite continens.* Non itaque in carnis commixtione consistunt nuptie, nec in sponsalium conuencione, sicut alii quidam putant, in qua tantum spes est futuri matrimonii. quod ex sponsalium diffinitione manifestum est[4]: *Sponsalia uero sunt mentio et repromissio futurarum nuptiarum.* [§ 5.] Alius itaque contractus est sponsaliorum[5], alius nuptiarum, et omnino utriusque diuersa proprietas. nam sicut arrarum datio in sponsalibus fit et non in nuptiis, ita dotis datio et natura in nuptiis perficitur et non in sponsalibus. item in sponsalibus non uxor dicitur sed sponsa, in nuptiis non sponsa sed uxor uocatur. item in sponsalibus non etas attenditur[6], non domicilium, non presencia, sed solus sufficit consensus. in coniugio uero tam etas quam presentia uel domicilium desideratur. Alie sunt preterea proprietates quibus separantur nuptie a sponsalibus. inter uirum enim et uxorem, et non inter sponsum et sponsam, donationes sunt prohibite. [§ 6.] His ita respondetur: Secundum leges seculi ita distinguntur nuptie a sponsalibus et non ecclesiastico iure, secundum quod coniugium est animorum quedam spiritualis coniunctio que in sponsalibus quidem iniciatur, in carnali uero permixtione perficitur et consummatur[7]. Semel enim tantum contrahitur, scilicet in conuentione sponsali, et

[1] Omit *et* MS. [2] c. 5, C. 27. q. 2. [3] dict. ante c. 1, C. 27. q. 2; Inst. 1. 9. 1.
[4] Dig. 23. 1. 1. [5] Sic, MS.
[6] *attenditur* in margin; *attendendum* in text.
[7] c. 36 et § 1 dict. post c. 39, C. 27. q. 2.

postea in carnis commixtione ipsa eadem coniunctio confirmatur et perficitur, sicut in rerum societate contingit. eadem enim societas quantum ad obligationem contrahitur in coniunctione que postea in rerum collatione perficitur et consummatur. item in pactione donationis eadem iniciatur donatio quantum ad obligationem, que mox peragitur in rei traditione. eadem ratio est in personarum coniunctione, que in omnibus tam liberis quam seruis, non seculari sed ecclesiastico iure, spiritualiter disponitur, et in omnibus unam habet matrimonii legem, ut sicut ingenuus dimittere non potest semel coniugio copulatus, ita seruus non possit dimittere uel dimitti. Ecclesia namque neque in coniunctione neque in disiunctione matrimonii iuris ciuilis sequitur regulas, sed spiritualem magis quandam, ut diximus, obseruationem, ut in ipsa sponsione representetur sacramentum anime ad deum, ut sicut sponsus sponse tunc adiungitur per consensum, ita intelligatur anima iungi deo per dilectionem. Vnde Ambrosius [1]: *In omni matrimonio coniunctio intelligitur spiritualis quam confirmat et perficit coniunctorum permixtio* [2] *corporalis*, 'coniunctionem anime spiritualem unionem ad deum exaudiens, in carnis uero commixtione latet sacramentum Christi et ecclesie, ut quemadmodum cum uxore una caro efficitur, ita Christus cum ecclesia una caro [3] factus esse credatur in utero uirginali.' 'quia uero primum sacramentum uiolabile est (anima enim [4] que adheret [5] deo apostat ab eo) merito figura eius, scilicet desponsatio, etiam inter legitimas personas ex quibusdam causis irritatur. sacramentum uero ecclesie [6] omnino est irrumpibile, et ideo in carnis commixtione ita matrimonium radicatur ut nulla occasione utroque uiuente ualeat euerti [7].' Hec autem sentencia, scilicet, quod in sponsalibus matrimonium per animorum coniunctionem inicietur, in carnis commixtione perficiatur et confirmetur pluribus aliis auctoritatibus comprobatur. Unde Ieronymus super Abdiam [8]: *Qua propter in filiabus uestris fornicabuntur et sponse uestre adultere erunt. notandum est quod in filiabus dicit fornicationem futuram et in coniugiis adulteria, que sponsali conuentione iniciantur et commixtione corporali perficiuntur.* item Ysidorus [9]: *Coniuges uerius appellantur ab ipsa* [10] *desponsationis fide.* item Augustinus [11]: *Coniuges appellantur* [12] *ex prima desponsationis fide, quam concubitu non agnouerat, nec fuerat cogniturus, nec perierat, nec mendax manserat coniugis appellatio, ubi nec fuerat nec futura erat carnis ulla commixtio.* [§ 7.] Sed contra hec querendum est, si in

[1] c. 36, C. 27. q. 2.
[2] *commixtio*, Friedb.
[3] *et una persona*, Rufinus.
[4] *frequenter enim anima.* Rufinus.
[5] *adhaeserat*, Rufinus.
[6] *Christi et ecclesiae.* Rufinus.
[7] *erelli*, Rufinus. The words within the inverted commas are almost exactly those of Rufinus, p. 391; but the passage is a little shortened. Compare also *Summa Coloniensis*, in Scheurl, Entwicklung des kirchlichen Eheschliessungsrechts, p. 167.
[8] c. 37, C. 27. q. 2.
[9] c. 6, C. 27. q. 2.
[10] *a prima*, Friedb. without variant.
[11] c. 9, C. 27. q. 2.
[12] *Coniunx uocatur*, Friedb.

sponsalibus iam est iniciatum coniugium, qua ratione dicetur futurum. *sponsalia enim futuri sunt matrimonii*[1], id est, eius quod nondum est. ergo in sponsalibus iniciatum matrimonium non est, aut matrimonium iniciatum non est matrimonium. [§ 8.] His ita respondetur a quibusdam: 'qui iurat se accepturum aliquam, continuo matrimonium contrahit, quia ei in futura carnis copula individue uite consuetudinem consentit[2].' Secundum quos propter solam carnis commixtionem matrimonium futurum dicitur, et non propter ipsam animorum coniunctionem et obligationem que in sponsalibus iam contracta est, quemadmodum in aliis contractibus ut in rerum societate et donatione et similibus contingit. quamuis etenim quantum ad obligationem societas et donatio iam facte dicantur, adhuc tamen quantum ad rei perfectionem et traditionem future nominantur.

[§ 9.] Contra hec autem dicendum est quod in negotio societatis tota perficitur obligatio in pactione participandi lucri uel dampni, et ipsa eadem tota tollitur et perimitur in executione participati lucri et dampni. et donatio quoque tota in pactione contrahitur, et tota in rei traditione soluitur. eadem est ratio in similibus. At in personarum societate, id est in matrimonii negotio, duos contingit fieri contractus. primus contractus est sponsaliorum, in quo etiam extranei obligantur ut ipse persone principales se mutuo accipiant cum dote et propter nuptias donatione prescripta et nominata. secundus contractus est nuptiarum in quo principales dumtaxat tenentur ad reddendum carnale debitum. In aliis quoque negotiis simile repperitur, ut in eo qui promisit tibi quod res tuas reciperet custodiendas, easque in ea causa postea recepit. sicut enim iste antequam res acciperet ex promissione ad custodiendum non tenebatur sed ad recipiendum, in secundo uero contractu id est, in recipiendo, dum ab obligatione recipiendi absoluitur, obligatur ad custodiendum: ita et in sponsalibus ad reddendum debitum non tenetur sponsus, sed ad recipiendam sponsam: in nuptiis uero, iam ad recipiendam eam obligatione sublata, ad debitum reddendum tenetur. [§ 10.] Aliquando tamen sine sponsalibus nuptie contrahuntur, ut accidit in Lya, que nequaquam fuit Iacob promissa, sed tradita[3]. non fuit ergo sponsa, sed uxor ratihabitione, non carnis commixtione. nam si ratihabitione Iacob Lya tradita, Rachelis soluta sunt sponsalia, sine dubio ea ratihabitione Lie nuptie sunt contracte etiam sine carnis commixtione, ut ita sit matrimonium absque sponsalibus et carnis commixtione. Secundum quod non

[1] Dig. 23. 1. 1: *Sponsalia sunt mentio et repromissio nuptiarum futurarum.*

[2] These words come from Rufinus, p. 393. But he has *futurum carnis copulam et individuae.*

[3] As to the case of Leah and Jacob, see C. 29. q. 1.

potest doceri quomodo in sponsalibus iniciari possit matrimonium, nisi ponatur *iniciari* pro quadam preparatione. Aut forte dicemus quod Ieronymus [1], sicut in alio huius rei articulo errauerit, ita et in hoc errare potuit. Potest etiam illud dici quod *sponsalem* eam conuentionem intellexerit que fit in traditione ipsa, in qua uterque profitetur se uelle alterum in coniugem habere. eadem uero fides que promittitur in sponsalibus de futura traditione exprimetur postea in ipsa traditione. ergo eadem dicitur et pactionis fides de futuro coniugio et fides consensus de presenti. et hec est illa fides, illa affectio que facit et format coniugium, ex qua secundum Ysidorum et Augustinum coniuges appellantur. *verius* inquit Ysidorus [2]: subaudi *quam ex concubitu.* cuius respectu, quia solet sequi, Augustinus [3] uocat eam *primam.* unde sequitur: *quam concubitu non agnouerat nec fuerat cogniturus.* non ergo respectu secunde fidei dicitur prima, sed respectu concubitus, quia eam solet sequi. Hec itaque sufficiant acta cum illis qui putant in sponsalibus iniciatum esse coniugium.

[§ 11.] Deinceps cum illis negociemus qui per consensum de presenti coniugium rectius initiari dicunt. Putant autem quidam quod consensus ille de presenti sit coniunctio animorum illa de qua supra ita scripsit Ambrosius [4]: *In omni matrimonio coniunctio, etc.* Secundum istos sufficit consensum exprimere per uerba presentis temporis, hoc modo: *Habeo te et accipio in coniugem et habere perpetuo uolo.* qua ratione etiam inter absentes per nuntium uel per epistolam potest contrahi matrimonium. [§ 12.] Que sentencia tam naturali iuri quam ciuili uidetur contraria, ut sola uoluntate et animi destinatione absque omni traditione possit fieri tua, cum promissa dote, illa que absens est. cum dominium uel possessio non possit solo animo adquiri absque corporali apprehensione, saltem oculis et affectu. Quod autem corporalis etiam traditionis et quasi possessionis sit coniunctio matrimonii probatur in uerbo decreti, in quo agitur de fide pactionis et consensus [5], quibus uerbis diffinitur tunc esse fides consensus *quando corde et ore consentit ducere et unus alii consenciendo mutuo se suscipiunt* [6]. Ergo re, id est, mutua susceptione contrahitur coniugium. Et tamen consensu dicitur fieri, ut dictum est, quia consensu formatur. nam maris et femine coniunctio ex se naturalis est et communis omnium etiam animalium et informis. ex fide uero consensus formatur, aliquando in matrimonium, aliquando in concubinatum. nam etiam concubinatus nomen iuris est [7]. [§ 13.] Item quod tunc fiat uxor quando

[1] c. 37, C. 27. q. 2. [2] c. 6, e. q. [3] c. 9, e. q. [4] c. 36, e. q.
[5] c. 51, e. q. Palea. Augustinus de fide pactionis et consensus.
[6] *ducere et mutuo se concedunt unus alii, et mutuo se suscipiunt.* Friedb.
[7] Dig. 25. 7. 3 § 1: 'Concubinatus per leges nomen assumpsit.'

accipitur, ostendit Augustinus ita scribens[1]: *Noli timere accipere Mariam coniugem tuam. quo sermone sponsam coniugem nominat, quia futura erat coniux.* Sed quando erat hoc futura, nisi quando acciperetur? nam carnalis nulla futura erat commixtio. Sed dicet aliquis: Iam cohabitabant, quando ergo accepta est? quando scilicet uxoris affectione eam habere cepit. tunc uero quasi tradita in uxorem intelligitur, quia per cohabitationem eius habebat facultatem. [§ 14.] Sed Iohannes Os Aureum in ewangelio super Matheum his contradicere uidetur scribens[2]: *Noli timere accipere Mariam coniugem tuam, quo sermone sponsam simpliciter*[3] *indicauit.* Item in eadem omelia[4]: *Sicut enim illam postea commendat Christus ipse discipulo, sic etiam nunc angelus copulat sponso, non in fedus sollempne coniugii, sed in consortium communis habitaculi.* Item[5]: *Si enim cognouisset eam et loco uxoris habuisset, quomodo illam dominus quasi absque solatio discipulo commendaret, iubens illi ut eam reciperet in suam?* Item Ieronymus in eodem ewangelio[6]: *Genuit Ioseph uirum Marie: Cum 'uirum' audieris, suspicio tibi non subeat nuptiarum, sed recordare consuetudinis scripturarum quod sponsi uiri et sponse uocantur uxores.* Item Origenes in eodem[7]: *Inuenta est habens in utero: a beato Ioseph, qui, licet eam non contingeret, future tamen, ut putabatur*[8], *uxoris omnia nouerat.* et infra: *Si tibi uxor nominatur, si in desponsatione tibi esse dicitur, non tamen uxor est, sed unigeniti dei mater eterna. Coniugem dico propterea, ut diabolo uirginitatem eius occultem, ut legis instituta non destruam. in sequentibus demonstrabo quod nec ista tua coniux secundum consuetudinem coniugii habeatur, nec iste qui generatur tuus filius esse credatur.* Item Gregorius in expositione ewangelii[9]: *Cum sero esset: Sic quippe discipulum post*[10] *resurrectionem suam dubitare permisit, sicut ante natiuitatem suam habere Mariam sponsum noluit, qui tamen ad eius nuptias non peruenit.*

[§ 15.] Manifeste uidentur hec aduersari uerbo Augustini[11], nam si secundum Iohannem inter eos *non fuit fedus sollempne coniugii*, secundum Ieronymum *non fuerunt nuptie*, secundum Origenem *non fuit uxor*, secundum Gregorium *non peruenit ad eius nuptias sponsus*, quomodo secundum Augustinum *non mendax mansit coniugis appellatio?* Qua ratione *ambo parentes* siue coniuges *sunt uocati*[12], nam secundum illos nullo uero modo ambo parentes uocati sunt? Sed notandum est quod etiam sibi ipsi quisque eorum discors aliqua ratione uideri potest, negando eam fuisse uxorem, cum illam fuisse sponsam omnes fateantur. Qua enim ratione

[1] § 2 dict. post c. 39, e. q.
[2] c. 42, e. q.
[3] *similiter*, Friedb., with *simpliciter* as variant.
[4] c. 42, e. q.
[5] c. 43, e. q.
[6] c. 40, e. q.
[7] c. 44, e. q.
[8] *putabat*, Friedb.; *putabatur*, ed. Rom.
[9] c. 45, e. q.
[10] Apparently *primo*, MS.
[11] c. 9, e. q.
[12] Ibid.

sponsa fuit, eadem procul dubio et uxor: cum indubie angelico monitu sponsalium fides et promissio impleta fuerit inter eos, eadem ergo ratione et matrimonium secutum est, et illa uxor facta probatur. Cum enim in sponsalibus promissio futuri matrimonii fiat, nisi matrimonium sequatur, ut promissum est, nec promissio inpleta dicetur. sed omnis inter eos iustissimos fides inpleta fuit. Qua ergo ratione promissa uel sponsa in sponsalibus prius fuit, eadem ratione in uxorem suscepta est postea, et uxor facta, secundum Augustinum [1], *non carne sed mente.* Nec tamen contra hoc illi senserunt, sed idem pocius, id est, quod uxor non fuit carne. Vnde Origenes [2]: *In sequentibus demonstrabo quod nec ista tua coniux secundum consuetudinem coniugii habeatur*, id est, secundum carnis propositum, sed secundum *legis instituta* ad custodiam et caste cohabitationis fidem pertinencia. Si [3] autem aliqua in supradictis discordia esse dicatur, quod diligencius intuenti uerius apparebit, ad illud Ysidori remedium recurrendum est ut illa ex dissonantibus sentenciis preferatur cuius antiquior et pocior extat auctoritas. [§ 16.] Ecclesiastica namque iura dissonas recipiunt sentencias et uarias formas, plerumque inutiles, quia non obseruantur, ut ecce: Sollempnem quandam nuptiarum formam instituit papa Evcaristius, quam obseruari precepit sub ea districtione ut, si aliter fieri presumerentur, non coniugia sed adulteria essent [4]. et ad confirmationem sue preceptionis eandem in fine, ut moris est, repeciit formam his uerbis: *Nisi uoluntas propria suffragauerit et uota succurrerint legitima*, que superius exposuerat de puella a parentibus et propinquioribus petenda et dotanda, et de ceteris que ibi continentur. Alii uero [5] non ad confirmationem eius preceptionis, sed magis ad eam infirmandam, dicunt in fine positam esse hanc adiectionem, ridiculosam facientes summi pontificis constitutionem, ut quasi quod perperam in inicio iusserat, confestim ductus penitencia mox in fine mutaret. Hec ita interpretantur ut querelam effugiant cuiusdam contrarietatis: nam alias dicitur matrimonium contrahi *solo consensu* [6], per hoc intelligentes parentum consensum et propinquorum, contra pietatem et equitatem tam naturalem quam ciuilem, excludi. Sed forte, ut supra dictum est, melius hoc dictum intelligitur ad excludendam opinionem eorum qui putant quod in carnis commixtione coniugium completur et perficiatur. nam secundum hanc sententiam non est infirmanda obseruatio constitutionis pape Evcharistii omni equitate plena et pietate, maxime cum generalis non sit ea constitutio sed specialiter ad eas pertinet puellas que in

[1] c. 9, e. q.   [2] c. 44, e. q.   [3] *Sed*, MS.
[4] c. 1, C. 30. q. 5.
[5] dict. post c. 8, e.q.; Pet. Lomb. Sentent., lib. iv. c. 28; Summa Rolandi, p. 151.
[6] c. 2, C. 27. q. 2.

potestate uel custodia parentum sunt constitute, non uidue sed uirgines bene custodite. Sicut etiam in decreto pape Leonis ostenditur quod sic incipit *Qualis debeat uxor esse*[1]. In nuptiis enim talium puellarum de naturali etiam ratione exigitur consensus parentum et propinquorum. quid enim iustius est quam ut consilio parentum et uoluntate huiusmodi puellis propter sexus fragilitatem consulatur, ne inconsulta facillitate et plerumque lubrico[2] etatis decepte in perniciem propriam et parentum dedecus turpissime nubant? Et ideo prouidus pater[3] ad roborandam preceptionis necessitatem ei penas subiecit, scilicet, ut adulteria essent si per iuris contumatiam aliter fierent. si uero per iuris ignorantiam aliter facta sint, adulterii quidem cessabit pena et crimen: culpa tamen non deerit fornicationis, nisi forte iusta causa nimie simplicitatis et ignorantie maritum excusare possit. quo casu, non adulterii, non fornicationis imminebit pena forsitan, nec tamen legitimum dicetur coniugium, sed simplex magis erit contubernium. Sic enim tam de ecclesiastico iure quam de ciuili interpretanda uidetur constitucio uiri utriusque iuris periti. In aliis uero puellis et mulieribus, que in custodia tali non sunt sed proprie potestatis sunt, et sui iuris, uel uidue, non exigitur ad earum coniugium uoluntas parentum ex iuris necessitate. Quod si forte etiam his puellis que in potestate sunt parentum, citra eorum consensum nubere, per aliquam forte summi pontificis constitutionem, permittatur, numquid ideo peruertenda est ueritas constitutionis pape Evcaristii, ut eam non preceptionem sed permissionem continere dicamus: quasi ius ecclesiasticum, quod cotidie cum ipso humano genere labitur et defluit, maxime circa ea que sunt moris et consuetudinis, contrarietatem recipere non possit? Illi enim qui ad hoc frustra laborant ut quamlibet passim contrarietatis discordiam reuocent ad concordiam, plerumque, ut uicium huiusmodi contra ueritatem euitare contendunt, in ueritate labuntur in peius, ut etiam in hoc casu. nam secundum eorum interpretacionem id quod non exigitur a lege sed tantum permittitur, ut pape Evcaristii forma et obseruatio, matrimonium facit esse *legitimum*[4], id uero quod a lege etiam exigitur, id est, sola nubentium uoluntas, matrimonium facit esse non *legitimum*. quod tale est ac si diceretur heredis quidem institutio, numerus testium, subscriptiones et cetera que exiguntur, testamentum faciunt non legitimum, fidei commissa uero et legata et libertates et alia, que tantum permittuntur a lege, legitimum faciunt testamentum. Vtinam non aliorum sit hec sentencia quam illorum qui causa contrarietatis fugiende in eam

[1] c. 4, C. 30. q. 5.
[2] Sic, MS.
[3] Pope Evaristus.
[4] dict. post c. 17, C. 28. q. 1.

decurrunt! Sed hec de constitutione pape Evcaristii dicta sufficiant.

[§ 17.] Nunc ad propositam materiam reuertamur. Ex his itaque que sunt dicta uerius uidetur quod mutua quasi traditione re ipsa coniugium copuletur. Inquiramus autem an tunc etiam perficiatur. Et cum matrimonium ius tantum sit, nichil ei adici uidetur per concubitum, qui tantum facti est et non iuris. nam post[1] susceptam uxorem uir eius de iure plenam officii sui non male dicitur habere potestatem. cur ergo dicetur esse inperfectum quantum ad officium quod perfectum[2] habet etiam ante concubitum? [§ 18.] His tamen expressum[3] aduersari uidentur uerba Ambrosii predicta: *In omni matrimonio coniunctio etc.*[4] Sed attendendum est, quia dixerat Ambrosius quod *non defloratio uirginitatis facit matrimonium sed pactio coniugalis*[5], et ad id apercius demonstrandum adiecerat quod ex eo coniugium est[6] quod[7] uiro coniungitur non quod uiro miscetur. errare posset aliquis et ex hoc putare quod nulla ratione carnale commercium exigetur ad huiusmodi contractum perficiendum, ideo docet carnalem commixtionem ad matrimonium perficiendum pertinere. nam potestate quidem nature ad efficiendum exigitur. actu uero ad demonstrandum matrimonium perfectum desideratur. Si autem queratur quare permixtione carnali perfici coniugium dicat, cum per consensum perficiatur et formetur, nam forma rei perfectio est, sciendum est quod matrimonium, quamuis extra perfectum per iuris formam appareat, tamen cum per nature potestatem latere possit, ad demonstrandam nature perfectionem actus permixtionis est efficax. et ideo perficere dicitur quia perfectum esse demonstrat. Hec autem sententia generalis est sicut et ipsa uerba *In omni matrimonio*[8]. Alia uero expositio uerbis[9] uim facit, ea[10] restringendo ad illas personas quas uocant legitimas. Immo et ut ibi deficiat necessario contingit. uerbi gratia ponamus aliquem reliquisse concubinam suam ex quo cognouit eam alienam esse uxorem, et, marito eius postea defuncto, continuo eam duxisse uxorem. hoc matrimonium secundum eam sententiam confirmari non potest, quia per legitimam coniunctionem una caro fieri non possunt, quia iam per adulterium una caro facti sunt. et secundum hoc nullum matrimonium inter aliquos contractum, qui ante matrimonium carne mixti fuerint, ita poterit confirmari ut iura sacramenti habeat, quia una caro nequaquam legitima coniunctione fiunt qui ante facti sunt.

[1] Apparently *primo* in compendio, MS.
[2] Possibly *perfectionem*, MS.
[3] Sic, MS.
[4] c. 36, C. 27. q. 2.
[5] c. 5, e. q.
[6] Omit *est*, MS.
[7] *cum* . . . *cum*, not *quod* . . . *quod*, Decret.
[8] c. 36, e. q.
[9] *uerb'*, MS.
[10] *eas*, MS.

[§ 19.] Hac itaque ratione infirmari uidetur ea sentencia ut in carnis actu consistat coniugii sacramentum, maxime cum et beate Marie coniugium absque omni concubitu Christi et ecclesie legitur habuisse sacramentum. Quod autem id speciale sit in eo coniugio, ut quidam dicunt[1], et si credere possim, qua ratione id uerum sit uidere non possum, quia non persone meritum sed coniunctionis species et proprietas perficit sacramentum. Preterea quod non sit speciale in eo coniugio, sed in aliis etiam ante carnis commixtionem locum habeat tale sacramentum, ex decreto constat Ormisde pape in quo legitur *quod si quis alicui mulieri fidem dederit pactionis, id est, sponsalia contraxerit, si aliam postea duxerit, penitenciam agat de fide mentita et maneat cum illa quam duxit.* et rationem reddit: quia uidelicet *tantum sacramentum rescindi non potest*[2]. His ergo uerbis ostendit quod cum alia, quam postea duxit, perfectum fit sacramentum. vnde sequitur: *si autem fecerit fidem consensus cum priore, non licet ei aliam ducere, et si duxerit, dimittat ipsam et adherebit priori.* Fides autem consensus in superiori[3] parte eiusdem decreti diffinitur esse *quando mutuo unus alii consentiendo se suscipiunt.* In hac ergo fide, quia continet sacramentum, ita perficitur matrimonium ut, si postea duxerit aliam, dimittat eam. Sed hic itaque ductione magis quam commixtione carnis consistere uidetur tam coniugium quam eius sacramentum. [§ 20.] Nec huic sententie aduersantur forte uerba pape Alexandri[4]. non enim dixit 'nisi carnis commixtione una caro fiant,' sed *nisi maris et femine legitima coniunctione duo una caro fiant, nullum inter eos erit coniugii sacramentum.* sed coniunctio ista nichil aliud est quam matrimonium, id est, ius quo sic obligantur etiam ante concubitum ad inuicem, ut uir sui corporis potestatem non habeat sed mulier, et econtrario uir mulieris. Ipso ergo iure uiri corpus est mulieris, et corpus mulieris est uiri. Sed quid est utriusque corpus nisi caro? ergo utriusque caro alterius inuicem. et ita duo non commixtione carnali sed coniunctione legitima sunt una caro. [§ 21.] His tamen obici possunt illa Augustini uerba[5]: *Non est dubium illam mulierem non pertinere ad matrimonium cum qua docetur* [*non fuisse*[6]] *commixtio sexus*, et secundum papam Leonem[7] *cum qua docetur non fuisse nuptiale misterium.* ergo secundum Augustinum non sufficit prefata coniunctio nisi sequatur *commixtio sexus*, uel secundum papam Leonem *nuptiale misterium*, ut mulier *pertineat ad matrimonium.* Sibi itaque aduersari uidetur Augustinus,

[1] See Rufinus, p. 394: 'speciale priuilegium.'

[2] Apparently the Palea which stands as c. 51, C. 27. q. 2, and attributes itself to Augustin.

[3] No, in the lower part of the Palea, as it stands.

[4] A forged, but not Pseudo-Isidorian, decretal of Alexander, pope and martyr. It is found in the Collectio Lipsiensis; see Friedberg, Quinque Compilationes, 205.

[5] c. 16, C. 27. q. 2. [6] Omit MS. [7] c. 17, e. q.

cum alibi dicat matrimonium esse perfectum sine concubitu ut supra ostensum est. sed quia ibi dixerat[1] quod *mendax non manserat coniugis appellatio, quamuis futura non esset carnis ulla commixtio*, credere posset aliquis quod nulla ratione exigeretur commixtio talis. ideo asserendo dicit quod non aliter *pertinet* mulier *ad matrimonium* nisi sexus commixtio, id est, miscendi naturalis potestas, cum ea fuerit, quemadmodum illa non pertinet ad testamentum cum qua non est factio testamenti, id est, cum qua de iure non potest fieri testamentum. ergo sicut illa cum qua non est factio testamenti, et si in testamento heres instituatur, non pertinet ad testamentum, ita et illa cum qua non est uiro commixtio sexus, si ab eo ducatur in uxorem, ad eius non pertinet matrimonium uel ad nuptiale misterium. Si autem inter eos sit carnalis commixtio, quamuis nondum ad actum prodierit, et inter primos amplexus uiro diceret Augustinus: 'Noli frater sic eam tractare, quia nondum ad tuum pertinet matrimonium,'—nonne ille recte responderet: 'Inciuiliter loqueris Augustine, cum mea sit uxor ad hoc tradita mihi, ut eandem habeam plenitudinem potestatis tam in primo quam in ultimo amplexu.' [§ 22.] His autem apertissime aduersatur auctoritas cuiusdam decretalis epistole que sic incipit[2]: *Lex diuine constitutionis etc.*, cuius sola aduersancia uerba hic inserui, hec uidelicet: *Prothoplaustus ille radix et origo nostra detractam sibi costam uidens in mulierem formatam prophetico spiritu inter alia protulit: 'Propter hoc relinquet homo patrem et matrem et adherebit uxori etc.': quibus uerbis innuit[3] non aliter uirum esse et mulierem[4] nisi carnali copula sibi cohereant. qui ergo nequaquam mixtus est mulieri[5] federe nuptiali, quo pacto per nuda sponsionis uerba possunt una caro fieri nullatenus ualemus intueri. propinquitas enim sanguinis uerbis dicitur non uerbis efficitur. sed neque osculum parit[6] propinquitatem, quia nullam facit sanguinis commixtionem.* Eadem ergo ratione neque fides consensus facit propinquitatem, id est, affinitatem, igitur nec matrimonium facit, quia nullam facit sanguinis commixtionem. Sola ergo commixtio carnis facit affinitatem uel propinquitatem, hoc est coniugium. [§ 23.] Huic sentencie omnes consentire uidentur qui extendunt sponsalia usque ad commixtionem. quia sponsalia concedunt esse futurarum nuptiarum, id est, earum que nondum sunt, et cum dicant tunc eas esse iniciatas, ignorantes sibi aduersantur, quum interim donec sponsalia secundum eos durant, omnino future sunt nuptie, id est, ante commixtionem, ut in ipsa carnis commixtione desinant esse future. ergo tunc demum esse incipiunt[7]. Ieronymus quoque in eam lapsus uidetur sentenciam.

[1] c. 9, e. q.
[2] c. 18, e. q. Palea.
[3] *innotuit*, Friedb.
[4] *uirum et mulierem posse fieri unam carnem*, Friedb.
[5] *extraneae mulieri*, Friedb.
[6] Omit *parit*, MS.
[7] *incipiant*, MS.

sed hanc sentenciam uero, ut[1] supra ostendimus, improbare uidentur periciores auctores ecclesie, docendo quod solo consensu fiat coniugium, dum se mutuo accipiunt. que sententia et rationi congruit et iuri ciuili.

[§ 24.] Hii uero qui usque ad concubitum sponsalia trahunt, plures enumerant casus quibus omnis coniunctio que fit ante carnis actum, secundum eos dissolui potest. Sunt autem hee: 'Desponsatio posterior carnis commixtione perfecta, spontanea alterius fornicatio, raptus[2], maleficium, melioris propositi electio, horrendi criminis perpetratio, alterius perpetua egritudo, captiuitatis continua detencio[3].' De his autem ea tractando persequamur que magis puto huic negotio expedire. [§ 25.] Primo itaque quando posterior desponsatio propter carnis commixtionem soluat priorem, inquirere possum, inuenire autem fateor me nescire. nam si prior sit sponsa, id est, promissa tantum non tradita, posterior uero etiam tradita, eo ipso quod ducta est, manere debet cum eo. prior uero remoueatur ex decreto Ormisde pape, et ipse de mentita fide penitenciam agat[4]. ex decreto tamen Sirii pape[5] tale matrimonium uidetur anathematizari, nisi forte ad factum tantum iniurie puniendum que prioribus sponsalibus facta est, et non ad ius matrimonii prohibendum respexerit papa. sicut prohibitio matrimonii cum uidua intra annum contracti ad iniuriam tantum pertinet commixtionis sanguinis dampnandam, et non ad ius matrimonii: et ideo ualet coniugium. Potest etiam illud dici quod de desponsata per fidem consensus papa Siricius questionem referat, que uxor etiam ante commixtionem fuit, et ideo secundum iuste dampnauit coniugium, ut ita commixtio nichil operetur in his casibus. [§ 26.] Si uero obiciatur auctoritas Ygnarii Remensis archiepiscopi[6], in qua ita scriptum est de his qui per sorciarias et maleficas impediuntur, quod *si forte sanari non poterunt separari ualebunt: sed postquam alias nuptias expetierint et illis in carne uiuentibus iuncte fuerint, prioribus quos reliquerant, et si possibilitas concumbendi eis reddita fuerit, reconciliari nequibunt*, ex his uerbis non habetur quod propter carnalem commixtionem id accidat, ut prioribus quos relinquunt, dum alii uiuunt in carne, non possint reconciliari: sed ideo ad priores non possunt reuerti quum ab eis iure *separati*, perfecto cum aliis iure, ante carnis etiam commixtionem, iuncti sunt postea. Quid ergo si non curauerunt ante a prioribus separari quam aliis iungerentur? Certe, si prior coniunctio de iure ualebat, simul due coniunctiones erunt, scilicet, secunda ualet. quod quidem tam de iure ciuili quam

[1] Omit *ut*, MS.
[2] A stop, MS.
[3] Rufinus, p. 392.
[4] Apparently the Palea which appears as c. 51, C. 27. q. 2, and ascribes itself to Augustin.
[5] c. 50, C. 27. q. 2 (Siricius papa).
[6] c. 4, C. 33. q. 1 (Hincmar).

ex decreto Ormide[1] pape est impossibile, quia *secundam dimittet et adherebit priori.* quamuis duas sponsas quis habere possit, non tamen sine nota infamie. Nec his aduersatur Ygmari sentencia, que non uult ut priori possit adherere uel conciliari dum alius in carne uiuit, quia non fit hoc ex carnali commixtione, ut dictum est, secundi, sed propter diuorcium prioris coniugii, quod ex his uerbis colligitur, scilicet, *prioris quos reliquerant et a quibus separati fuerant*[2]. Hec dico secundum sentenciam Ygmari archiepiscopi. qui dicit eos posse separari. nam si prius matrimonium de iure ualuit et solutum non fuit, uel solui propter casum maleficii non debuit, secundum matrimonium de iure non tenuit. ergo uxor ex eo non fuit sed adultera. Sed an prius coniugium de iure ualuerit, etsi ex premissis possit intelligi, infra tamen apercius ostendetur. Item an propter huiusmodi alterius casum huiusmodi[3] coniugium post mutuam susceptionem debeat dissolui diligencius inquiram. Hoc plane dico quod priori coniugio per fidem consensus contracto de iure non potest preiudicium fieri per secundum. sed sponsalibus. in quibus fides tantum pactionis facta est, potest, absque omni repudio, postea preiudicari per fidem consensus, cessante etiam omni carnis commixtione in huiusmodi casibus. Ex sentencia itaque Ygmari archiepiscopi non inuenio quod prior desponsatio tollatur per carnalem confirmationem posterioris, siue fides pactionis siue fides contractus in posteriori desponsatione fuit. Hec sufficiant de soluenda desponsatione propter concubitum et de inpeditis per sortiarias.

[§ 27.] De confugientibus autem ad electionem melioris propositi scribit Evsebius papa his uerbis[4]: *Desponsatam puellam non licet parentibus alii uiro tradere, tamen licet sibi monasterium eligere.* non enim licet parentibus uel ipsi puelle contra fidem uenire pactionis, sicut dictum est in decreto Ormisde pape[5]. si tamen contra fidem predictam tradatur alii uiro, *cum eo manebit, et*[6] *ipsi de fide mentita agant penitenciam.* Quod si in sponsalibus contrahendis, non religio fidei, sed tantum arrarum datio forte interuenit, penam pacientur arrarum dumtaxat parentes puelle, si tamen prefatis sponsalibus, antequam secundo uiro traderetur, renunciauerint. si uero id non fecerunt, penam etiam infamie sustinebunt[7]. Si uero non alium uirum sed monasterium puella elegerit, nullo nec arrarum nec fidei dampno mulctabitur ipsa uel parentes eius. Vnde Gregorius in registro[8]: *Decreta legalia desponsatam si conuerti uoluerit nullo omnino censuerunt dampno mulctari.* ergo nec fidei, nam qui ex iusta causa fidem deserit, eam non uidetur mentiri. vel dicemus non fuisse

[1] Apparently the Palea, c. 51, C. 27. q. 2. [2] Not an exact quotation.
[3] *huiusmodi* interlined, perhaps unnecessarily, MS. [4] c. 27, C. 27. 2.
[5] c. 51, e. q. [6] Omit *et*, MS. [7] Dig. 3. 2. 1. [8] c. 28, e. q.

fidem promissam in hoc casu, quia lege excipitur. nam etiam sponsus puelle ita fidei sicut et arrarum obligationem potest remittere ut inpune etiam alii nubat. ergo inuito sponso puellam non licet alii uiro tradere inpune. licet autem sibi monasterium [1] omnino sine pena. Ex aliis quoque causis super enumeratis sponsalia sine pena uidentur posse solui.

[§ 28.] Hec de soluendis sponsalibus sufficiant. Hoc tamen notandum est quod in dissolutione sponsalium persone ab obligatione *solui* dicuntur. quia tantum obligate sunt, priusquam uero se mutuo susceperunt in coniuges, quia tunc, cum [2] iuncti sunt, *separari* dicuntur. De his ergo uidetur dictum : *Quos deus coniunxit homo non separet*, ut *nisi ex causa fornicationis* separari non debeant. [§ 29.] Hic autem respondendum est quod de his quidem illud dominicum dictum est, sed tunc locum habet quando coniugium perfectum est per carnis commixtionem. [§ 30.] Sed contra hoc dici potest quod in ipsa tradicione, ut sepe dictum est, perficiatur coniugium. nam ubi uiro tradita est uxor, confestim sua facta est ut plenum habeat iam cognoscendi eam officium et potestatem, quemadmodum sacerdos legitime ordinatus et institutus in aliqua ecclesia minister [3], ex quo in eius possessione inductus est, integram et perfectam habet sui officii potestatem, ante etiam quam eam exerceat. Non enim ideo res aliqua exercenda est ut perficiatur, sed ideo perficienda ut exerceatur. ut episcopus, sacerdos, diaconus, item et ea que consistunt in facto ut domus, nauis, securis. omnia enim perficiuntur priusquam exerceantur, excepto matrimonio solo. [§ 31.] Ad hoc responderi potest quod in executione aliquando res perfici dicitur, que tamen quantum ad obligationem ante perfecta est. sicut legitur in titulo *Quod metus causa* his uerbis [4] : *Et quidem* [5] *aut inperfecta res est ut puta stipulationem numeratio non est secuta, aut perfecta si post stipulationem numeratio est facta.* stipulatio tamen ante numerationem quantum ad obligationem est perfecta. ergo et matrimonii perfectio alia est in obligatione, alia in solutione. sed sciendum est quod de negotio [6] uolentis per stipulationem puram exigere dicitur quod sit inperfecta res ante numerationem, non de stipulatione que perfecta est et consummata in ipsa uerborum conceptione, sicut iniuria iniqui iuris dicitur perfecta et consummata quando quis impetrauit ius iniquum, et si eo nunquam utatur. eadem ergo ratio locum habet in matrimonio. [§ 32.] Sed quamuis predicte rationes cogant fateri absque concubitu matrimonium esse perfectum, tamen illud preceptum dominicum in eo locum non habet ante concubitum, scilicet, *Quos deus coniunxit, etc.* quod ex

[1] Sic, MS.
[2] Omit *cum*, MS.
[3] *minist'*, MS.
[4] Dig. 4. 2. 9, § 3.
[5] Probably *quidem*, MS.
[6] *denegatio*, MS.

multis auctoritatibus et exemplis colligitur. unde Yeronymus ita scribit de adultera: *Immo cum illa unam carnem in aliam diuisit et se fornicatione a marito separauit, non debet teneri. ne uirum quoque sub maledicto faciat, dicente scriptura 'Qui tenet adulteram stultus et impius est* [1].' cum ergo dicit *unam carnem diuidit*, ostendit ex una carne coniunctionem ipsam uim habere. Item Gregorius: *Si igitur uir et uxor una caro sunt, et religionis causa dimittit uir uxorem, uel uxor uirum, que est ista conuersio in qua una et eadem caro ex parte transit ad continenciam et ex parte remanet in corruptione* [2]*? sed Achatius* [3] *precipuus inter heremitas, celebrato nuptiarum conuiuio, cum uespere thalamum esset ingressus ex urbe egrediens heremum elegit. item beatus Alexius ex nuptiis sponsam deseruit* [4]. ergo neuter istorum cum ea quam duxerat una caro factus fuit, et ideo continencie causa relinquere uxores licuit. [§ 33.] Sed respondendum est, ut supradiximus, quod in matrimonio coniunctio duorum in unam carnem magis fieri uidetur uinculo iuris quam opere carnis. alioquin et in concubinatu eadem erit ratio, ut non debeat una caro pro parte remanere in corruptione, pro parte ab ea transire, cum et ibi duo sint una caro. Sed dicet aliquis, 'Non sufficit opus carnis nisi procedat ex legitima coniunctione, sic enim scriptum est [5] *nisi legitima coniunctione duo una caro fiant*.' Quid ergo dicemus si cum tua concubina nuptias celebraueris? ea ratione relinquere eam poteris quia ex legitima coniunctione cum ea una caro esse non potes, utpote iam ante in concubinatu cum ea una caro factus. Si uero diuertere non potes iam illi adeo coniunctus, quid hoc facit nisi *confederatio nuptialis*, que, secundum Augustinum [6], nec etiam ex causa fornicationis, soluitur per divorcium. cuius confederationis sacramentum sine carnis commixtione in ipsa fidei obligatione et consensu perfici ex decreto Ormisde pape supra patet. Hoc ergo sacramentum etiam post diuorcium legitimum ita manet, sicut et ille retinet in se [7] sacramentum regenerationis qui propter crimen aliquod anathematis gladio precisus est ab ecclesie corpore cui iunctus fuerat, et inuitus magis uinculo dum iniciaretur, quam executionis opere aliquo dum Christiani officium prosequeretur. [§ 34.] Hanc autem rationem, id est, ut magis uinculum iuris in unum quoddam corpus plures iungat et uniat quam actus aliquis executionis, etiam in matrimonio locum habere cogit fateri matrimonium beate Marie Virginis. cuius sacramentum suo iunxerat marito ipsam uirginem integritate federis, non actione carnis. per quam actionem non obligantur in unum corpus aliqui, et si per eam unum [8] corpus aliqua ratione

[1] c. 2, C. 32. q. 1.
[2] c. 19, C. 27. q. 2.
[3] *Macharius*, dict. post c. 26, e. q.
[4] dict. post c. 26, e. q.
[5] Pseudo-Alexander; Friedberg, Quinque Compilationes, p. 205.
[6] c. 1, C. 32. q. 7.
[7] *uise* or *inse* as one word, MS.
[8] *unus*, MS.

fiant. Ex his credi potest quod matrimonii sacramentum insolubile fit magis iure ipsius federis quam executione carnali. [§ 35.] De Alexio et Achatio responderi potest quod non eorum exemplis iudicandum est sed legibus. aut, si aliud non appareat, dicet quis quod uxorum habuerunt assensum. quod uerisimilius est. aut forte sub lege fuerunt diuortii, que in ecclesia diu post tempora Iustiniani durauit.

[§ 36.] Sed et si dixerimus legem diuortii etiam hodie ante concubitum ex certis forte causis locum habere, num ideo dicendum est tunc matrimonium non esse *ratum*[1]? vnde procedit hec distinctio *rati* uel significatio, ut id demum debeat dici *ratum* quod non potest solui? Secundum hoc nullum coniugium, nec beate uirginis, in ueteri lege uel in ecclesia usque ad tempora Ivstiani[2] fuit ratum, eo excepto in ueteri lege qui puellam a se oppressam non desponsatam duxerat. nam solus ipse diuorcii legem amittebat propter uiolencie delictum. ea racione ex ipsius tantum parte ratum erat matrimonium, qui solus diuertere ab uxore non poterat. uero magis propter culpam quam propter iusticiam ratum fieret huiusmodi coniugium. Hoc autem absonum uidetur ut non iusticie proprio merito coniugium ratum uel non ratum dicatur, sed magis id penderat ex lege diuorcii. nam si iccirco aliquid dicitur ratum quia solui non potest, nullus contractus habebitur ratus, maxime societas, in qua nemo inuitus detinetur. sed nec etiam mandatum erit[3] ratum. male igitur comparabitur rati habitio, cum omne mandatum possit solui. item si id tantum ratum dicitur matrimonium quod solui nequeat, uel irritum fieri, ea ratione nullum testamentum ratum erit, cum omne testamentum capitis diminutione possit irritum fieri. In toto autem corpore iuris id *ratum* esse dicitur quod de iure ualet, uel de iure probatur, et si solui possit, et eatenus habetur ratum quatenus ratum probatur, et id tantum quod est contra[4] legem non ratum esse dicitur. vnde pretor ait[5]: *Quod metus causa gestum est ratum non habeo.* quid hoc aliud de iure ratum haberi quam de iure probari? sic enim dicimus a me ratum haberi quod a me probatur. vnde Pomponius[6]: *Si negocium a te, quamuis male gestum, probauero*, id est, ratum habuero. et ideo sequitur: *Videndum ne in hoc dubio an ratum habeam*, id est, probem, etc. [§ 37.] Quare si ratum est matrimonium quia de iure ualet, ratum habendum est matrimonium etiam infidelium. quibus respondit dominus quod *non liceat uxorem dimittere*, et adiecit *Quos*

[1] dict. post c. 17, C. 28. q. 1. [2] Sic, MS. [3] *erit* repeated, MS.
[4] *quod eccontra* apparently, MS. [5] Dig. 4. 2. 1.
[6] Dig. 3. 5. 8 (9): 'Scaeuola libro primo quaestionum: Pomponius scribit, si negotium a te quamvis male gestum probavero, negotiorum tamen gestorum te mihi non teneri. videndum ergo ne in dubio hoc, an ratum habeam, actio negotiorum gestorum pendeat.'

deus coniunxit homo non separet. vnde papa Innocencius: *Ne putetur de his locutus esse qui post baptismum uxores sorciuntur, ideo et hoc a iudeis interrogatus*[1] *et eis responsum est*[2]. Quamuis ergo lege fori diuertere poterant, tamen lege poli non debeant *quos deus coniunxit.* et ideo ratum erat eorum matrimonium. nam secundum Augustinum illud matrimonium *non est ratum quod est sine deo*[3], id est, contra dei leges et precepta et inter fideles. *Sacramentum ergo coniugii,* ut ait Augustinus, *omnibus gentibus commune est. Sanctitas autem sacramenti non nisi in ciuitate dei nostri est et in monte sancto eius. Sacramenta enim ubicunque sunt ipsa sunt.* vnde Augustinus[4]: *Sanctitas sacramentorum in nullo peruerso uiolatur. constat enim eam etiam in his qui sunt scelerati inpollutam atque inuiolabilem permanere. et quod mali dicuntur eam polluere, quantum in ipsis est*[5], *cum illa inpolluta permaneant. sed in bonis permanet ad premium, in malis ad iudicium.* Sanctitas autem sacramenti duobus modis accipitur. sacramentum quippe est ipsum sacre rei signum. sanctitas uero sacramenti est eius uirtus, que in bonis tendit ad premium, in malis ad detrimentum. Secundum hanc significationem dixit Augustinus[6]: *Si non habuit Saul sacramenti sanctitatem, quid*[7] *in eo David uerebatur*[8]. et infra: *Ecce Saul non habuit innocentiam, et tamen habuit sanctitatem, non uite sue sed et sacramenti dei.* Alio modo dicitur sanctitas sacramenti effectus sacramenti, id est, meritum quod eius uirtus in bono operatur. secundum hanc significationem dicit Augustinus sanctitatem sacramenti non esse nisi in ciuitate dei et in sancto eius. Virtus quoque corporalis medicine eadem in alio salutem secundum subiecti dispositionem in alio corruptionem facit. cum tam ipsa uirtus, quam eius effectus, sanitas dici possit medicine. [§ 38.] Cum itaque sacramentum habeat coniugium infidelium, quare non dicetur ratum et perfectum, cum perfectum dicatur quod ius et natura admittit? unde si alterum deest, inperfectum est, id est, nullum, sicut inperfectum testamentum non est testamentum, ergo propter nature frigide inpedimentum deficit matrimonium. et ideo Gregorius de naturaliter frigido sic loquitur[9] *iste qui non potest uti ea pro uxore, habeat eam quasi sororem,* his uerbis aperte docens quod si[10] uxoris loco esse potest cum natura deficiat. Quid ergo si solus casus impediat, puta sortiarie maleficium? nichilominus perfectum est cui nichil deest de natura uel iure. quos enim natura non impedit perficere, ius, si adsit, obligare potest. [§ 39.] Ratio huiusmodi disputationis demonstrat perfectionem coniugii inter eos esse etiam qui per sorciarias impediuntur. Cum ergo

[1] *interrogatum,* Friedb.
[2] c. 1, C. 28. q. 1.
[3] dict. in prin. C. 28. q. 1.
[4] c. 97, § 7, C. 1. q. 1.
[5] Insert *dicitur,* MS.
[6] c. 87, § 6, C. 1. q. 1.
[7] *quod,* MS.
[8] Corr. *uenerabatur.*
[9] c. 2, C. 33. q. 1.
[10] Sic, MS. Corr. *non* (?).

secundum sentenciam Ygmari[1] dirimi possit tale coniugium, ratio inquirenda est cur id fieri possit. cum et illud constet eos non debere separari nisi ex causa fornicationis *quos deus coniunxit.* Secundum doctrinam itaque quorundam modernorum magistrorum tam ex maleficio quam ex aliis pluribus causis, ut supra ostendimus, coniuges ante concubitum possunt separari et aliis iungi, quia nondum sunt una caro facti. Hec tamen ratio ex legis alicuius uel auctoritatis uerbis non procedit, sed magis ex magistrorum interpretacione descendit: ex interpretacione uero Ambrosii super epistolam ad Corinthios[2]: *Et si uir non debeat dimittere uxorem, si tamen dimiserit, licet ei ducere aliam, et ideo* secundum Ambrosium *non subdidit de uiro apostolus quod de uxore premiserat*[3], *scilicet, quod aut reconcilietur aut sine nuptiis maneat.* Ex concilio uero apud Vermeriam[4] *is qui ex necessitate in aliam transierit prouinciam sine spe reuertendi, si uxor eius eum sequi noluerit, si se continere non potest, aliam cum penitencia ducat.* Quis dubitat contra ordinem iuris ecclesiastici fieri, et magis extraordinaria dispensatione ad id euitandum quod est deterius concedi? vnde sub conditione permittitur, scilicet, si continere se non poterit. item adicitur *cum penitencia,* quia sicut supra dixit Ambrosius, non debet uir uxorem dimittere ex ordine. et ideo si ex despensatione id faciat, ne fiat impune. Tales enim sunt testiculi Leuiathan, propter quos Moyses in ueteri lege ordinarium ius diuorcii fecit, ea uidelicet ratione ne deterius contingeret. Si ergo uel propter carnis commixtionem uel propter aliam probabilem rationem possit quidam uera interpretacione aliam inuenire regularem exceptionem dominice regule, qua generaliter precepit ne quis uxorem relinquat nisi ex causa fornicationis, que inuidia erit! Ea propter nullam ex propositis sentenciam eligere uolui quasi precipuam, nullamque declinare, nisi ratio aliqua se mihi offerens in aliam me extrahit partem, sine preiudicio tamen melioris sentencie, quam forte peritus lector poterit inuenire.

[1] c. 4, C. 33. q. 1. [2] c. 17, C. 32. q. 7. [3] *promiserat,* MS.
[4] c. 9, Decret. Vermer. a. 753 (Mon. Germ., Capitularia, ed. Boretius, i. 41).

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